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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

13 CR 811

5 MARTIN AVALO,

6 Defendant.

7 -----x
8 New York, N.Y.
9 July 16, 2015
2:40 p.m.

10 Before:

11 HON. ANDREW L. CARTER, JR.,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 RUSSELL CAPONE

Assistant United States Attorney

18 DAVID GREENFIELD

19 BENNETT M. FEITELL

Attorneys for Defendant

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(In open court)

(Case called)

THE DEPUTY CLERK: Counsel, please state your appearance. For the government?

MR. CAPONE: Russell Capone for the government. Good afternoon, your Honor.

THE DEPUTY CLERK: And for the defendant?

MR. GREENFIELD: Good afternoon, your Honor. David Greenfield and Bennett Feitell for the defendant, Martin Avalo.

THE COURT: Good afternoon.

Good afternoon, Mr. Avalo.

Are the parties prepared for sentencing today?

MR. GREENFIELD: We are, your Honor.

MR. CAPONE: Yes, your Honor.

THE COURT: All right. To the extent that I did not already do so, I accept the plea of guilty that was offered on November 10, 2014.

In preparation for today's sentence, I have reviewed the presentence report, a letter submitted by Mr. Avalo, a sentencing submission from defense counsel, as well as a submission from the government.

Is there anything else that I should have?

MR. GREENFIELD: Not that I'm aware of.

MR. CAPONE: No, your Honor.

THE COURT: Defense counsel, have you read the

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1 presentence report and discussed it with your client?

2 MR. GREENFIELD: Numerous occasions, Judge.

3 THE COURT: Mr. Avalo, have you read the presentence
4 report and discussed it with your attorney?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Have you had the opportunity to go over
7 with him any errors in the report or anything else that should
8 be taken up with me?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Counsel for the government, have you
11 reviewed the presentence report?

12 MR. CAPONE: I have, your Honor.

13 THE COURT: Okay. Are there any objections to the
14 report regarding factual accuracy?

15 MR. CAPONE: No, your Honor.

16 MR. GREENFIELD: No, your Honor, but I do have
17 something to say about the guideline calculation.

18 THE COURT: Before you get to that, is there any
19 objection to the guidelines calculation in the presentence
20 report?

21 MR. GREENFIELD: No, your Honor.

22 MR. CAPONE: No, your Honor.

23 THE COURT: Is there objection to anything else in the
24 presentence report?

25 MR. CAPONE: No, your Honor.

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1 MR. GREENFIELD: No, your Honor.

2 THE COURT: Although I'm no longer required to
3 following the sentencing guidelines, I'm still required to
4 consider the applicable guidelines in opposing sentence, and to
5 do so, it is necessary that we accurately calculate the
6 guideline sentencing range.

7 I have done my own independent evaluation of the
8 guidelines, as well, and I agree with the guideline calculation
9 that's set forth in the presentence report. So based on my own
10 independent calculation, as well as the lack of any objection
11 by either party, I will adopt the guideline range as set forth
12 in the presentence report, total offense level of 23 with
13 criminal history category V, resulting in a guideline range of
14 84 to 105 months.

15 MR. GREENFIELD: Your Honor, if I might --

16 THE COURT: Before you do that, let me also deal with
17 one other matter. Let me make sure, Mr. Avalo, are you
18 prepared to go forward with sentencing today?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: In the last 24 hours, have you had any
21 alcoholic beverages, drugs, or medication of any kind?

22 THE DEFENDANT: No, sir.

23 THE COURT: Is your mind clear as you sit here today?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Go ahead, counsel.

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1 MR. GREENFIELD: Judge, with respect to the
2 government's submission to the Court about the finding of
3 category V, in it, on the bottom of page 1, it says, "Avalo
4 does not dispute the fact that he falls within category V, and
5 the plea agreement does not limit the government to argue for a
6 sentence within the guidelines." That is all true.

7 Between myself and Mr. Masimore we reached an
8 agreement that the sentencing guideline criminal history
9 category should be IX, not the number XI that they're talking
10 about now. And in order to try to deal with the difference
11 between what was in the plea agreement at IX and what the
12 pretrial report says should be XI, I initiated a series of
13 phone calls between myself and Mr. Masimore, going back to
14 January of this year, and I brought it to his attention that I
15 thought the guidelines overstated the seriousness of his
16 criminal history.

17 He said, look, I haven't had a chance to look at it
18 yet. Obviously, these are not quotes, but they're the
19 substance of the conversation. I said, all right, get a chance
20 to look at it and get back to me. And I initiated three, four,
21 maybe five more phone calls, and always the same thing.

22 I haven't had a chance to look at it yet. He also
23 said that it is the policy of the office usually to stand by
24 their agreement. So he couldn't see, based on what I said
25 about these two misdemeanors that occurred in 2013, which ended

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1 in violation pleas should kick his criminal history category
2 from 70 to 84, on the minimum side. That's a 14-year kick for
3 two pleas to a misdemeanor within a month sometime in 2013.

4 I was becoming alarmed by this, Judge. I hadn't heard
5 from Mr. Masimore. Finally, the end of June, I called his
6 office, got a voice mail message that he was in Italy; if
7 something was important enough, please call.

8 I called him. The same conversation occurred. He
9 would get back to me. He never did. There's never been a
10 resolution.

11 I made the mistake -- that he shouldn't be punished
12 for -- I made the mistake to believe that collegiality still
13 existed and that when somebody tells me that there is basically
14 a policy that they will live by their plea agreement, I figured
15 I could file my sentencing memo without referring to that, and
16 I hoped that it would be resolved before we came before your
17 Honor. But it hasn't been. And I think that the finding of 84
18 to the high end is totally unfair to my client based on his
19 criminal record. If I can, I will go over it with you.

20 THE COURT: Wait. Before you do that, let me just
21 state some things for the record. I am not supposed to get
22 into any sort of plea negotiations between the government and
23 the defense. Any other negotiations the government and the
24 defense want to have in terms of positions they want to take at
25 sentencing, again, is something that is up to them.

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1 Even to the extent that the defense and the government
2 were to agree as to what the appropriate guideline range would
3 be, that would not be binding on me nor it would be binding on
4 the probation department, as was made clear at the time
5 Mr. Avalo pled guilty. There was no promise at that time as to
6 what his guideline range would be, nor is there a promise as to
7 what his sentence would be. Those factors would be things that
8 I would consider.

9 I understand, I suppose, defense counsel's frustration
10 regarding any potential miscommunications and breakdown in
11 negotiations between defense counsel and the government, but in
12 terms of the guidelines, which are advisory, they're not
13 binding on the Court anymore, I have the discretion to, once I
14 have determined the guideline range, as I have, to sentence
15 Mr. Avalo within or outside of that guideline range, and I can
16 do so either based on what was commonly called in the past
17 downward departures or a sentencing variance, as sometimes it
18 is called. In any event, considering all of the factors in
19 18 U.S.C. 3553, which is what I need to be concerned with now,
20 that we have established the guideline range that applies, the
21 nonbinding guidelines range that applies.

22 I understand defense counsel's position to be that it
23 would be unfair to sentence him as if he were within sentencing
24 criminal history category V. I understand that. I take that
25 argument to be, as expressed in the letter, an argument for a

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1 sentencing variance as opposed to a downward departure. I
2 believe the parties may have an agreement amongst themselves.
3 I don't know if they do or do not. It's typically the case
4 that parties have agreements not to seek downward departures.
5 That certainly doesn't prevent the Court from sua sponte
6 considering downward departures.

7 I have seen what defense counsel has submitted
8 regarding the criminal history category in this case, and I
9 have also done my own evaluation of his criminal history
10 category, and I need to, under Second Circuit authority, give
11 the parties notice that I am considering a downward departure
12 based on the criminal history category substantially
13 overstating the seriousness of his criminal record. Obviously,
14 those are factors that I consider as a sentencing variance, as
15 well, outside of the earlier sentencing departure regime. But
16 for a departure, if it is not something that was laid out in
17 the parties' submissions -- and again, looking at the
18 submissions, it did not appear to be laid out as a request for
19 a downward departure -- I need to give the parties notice that
20 I'm considering that. It doesn't mean I'm going to do that.
21 But I need to give the parties notice of that under Second
22 Circuit authority so the parties can discuss whether or not
23 they wish to proceed or whether or not they wish to have some
24 time to think about this before we continue.

25 I guess initially let me ask the government, do you

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1 need more time to proceed or do you need more time to think
2 about whether you need more time to proceed? If you would
3 like, I can take a five-minute recess, and you can let me know
4 if you need more time before we continue, and I will ask the
5 same question of defense counsel.

6 MR. CAPONE: I don't think we need more time, your
7 Honor.

8 THE COURT: Defense counsel?

9 MR. GREENFIELD: Is it you are considering a downward
10 departure at this time?

11 THE COURT: Yes, but I didn't way I was going to do
12 it, but --

13 MR. GREENFIELD: We are ready to proceed, your Honor.

14 THE COURT: Now that I have raised that sua sponte and
15 given the parties notice that I am considering that, let me
16 hear -- let me just share what my thoughts are regarding this.
17 Mr. Avalo is in criminal history category V. My considering a
18 downward departure is not contingent on or predicated on
19 whatever analysis the parties may have had in terms of the plea
20 agreement, because as I have said before, anything in that plea
21 agreement regarding the parties' guideline estimate is not
22 binding on the probation department or the Court. Again, we
23 can move beyond I believe any of these arguments about
24 negotiations between the parties and all of these other things.

25 Let me just hear from the parties on the proprietary

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1 of a downward departure, starting with counsel for the defense.

2 MR. GREENFIELD: Judge, if I might, the criminal
3 history of my client begins in 1997. As an 18-year-old, he was
4 arrest for the sale of marijuana. He was sentenced to
5 probation and then sentenced to jail because he was in
6 violation of his probation. He received three points for that
7 on that plea in 1997, 1998.

8 Next, he is arrested November 28th of 2001 for a
9 street sale of \$20 worth of cocaine. For that, he received
10 three more points and five years in jail, basically.

11 From that point on, at the age of 22, in jail for
12 maybe five years or so, maybe more, maybe up to six, he was
13 never arrested again until 2013, and he was arrested over a
14 period of three separate days in May and June of 2013, each for
15 misdemeanor weight marijuana, which were disposed of by
16 violation pleas in criminal court where he received a
17 conditional discharge and a \$50 fine.

18 The government makes him a hardened criminal based on
19 his criminal record at this point. I'm saying, based not only
20 on his life, the problems that he's faced in his life, his
21 addiction, his abuse as a child for sexual abuse, that the fact
22 that the probation department moved him over and the Court has
23 agreed to move it over to category V, that it makes it a
24 14-month jump absent those misdemeanor -- or not even
25 misdemeanor arrests -- conditional discharge pleas in 2013. If

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1 they weren't there, he'd be clearly in category IX. What puts
2 him in category XI are three misdemeanor pleas.

3 THE COURT: Just to be clear, when you are talking
4 about category IX and XI, I assume what you're talking about --

5 MR. GREENFIELD: Criminal history category --

6 THE COURT: -- 11 points, which would have him
7 criminal history category V and 9 points that would have him
8 criminal history category IV?

9 MR. GREENFIELD: Correct.

10 It overstates the seriousness of his criminal conduct.
11 The two major matters occurred before he was 22 years old, in
12 1997 and 2001. After that he had a good work record. When he
13 got out of jail, he had a good work record. You have tax
14 returns for the years 2010 '11, and '12, and it is indicated in
15 paragraph 150 of the probation report. He had work release
16 while in prison, and he worked two years while in prison. The
17 only reason he was not working after that is he lost his job
18 because of a layoff in a non-union situation.

19 THE COURT: Tell me specifically which convictions it
20 is that you believe substantially overstate the seriousness of
21 his criminal record?

22 MR. GREENFIELD: There were two. There were three
23 arrests but two. In May and June of 2013 for marijuana.

24 THE COURT: And why is it that you feel those
25 overstate the seriousness, substantially overstate the

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1 seriousness of his criminal record or the likelihood that he
2 would re-offend because, obviously, under the case law I am
3 also supposed to consider that, as well, the likelihood that he
4 would re-offend.

5 MR. GREENFIELD: There is no issue but that he is a
6 drug abuser. His drug abuse started at 11, when he was
7 misusing, if I can use that phrase, prescription drugs. He
8 started using marijuana at the age 12. He became addicted, if
9 that's the right word, to marijuana soon thereafter. He smoked
10 marijuana basically after the day of his arrest, and he abused
11 legal substances such as Codeine, Oxycontin, and other legal
12 substances.

13 The arrests were because of his addiction. He was out
14 there trying to earn a few dollars for himself so he could buy
15 some drugs. That's what he was out there for, Judge. He
16 wasn't out there as a burglar. He wasn't out there as a seller
17 of large amounts of drugs. He was selling small amounts,
18 misdemeanor amounts on the street, and that's what he was
19 arrested for. Adding 14 months to his prospective minimum
20 sentence I don't think is appropriate.

21 THE COURT: So the record is clear, the guidelines are
22 advisory. The guidelines are advisory, they're not mandatory.

23 MR. GREENFIELD: I understand that, Judge.

24 THE COURT: What I'm concerned about in terms of those
25 last two convictions that you're referencing, it very well may

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1 be that his criminal history category V substantially
2 overstates the seriousness of his criminal record or that he
3 may re-offend. I don't know about those last two doing that.
4 Those last two, to me, don't seem to indicate a likelihood that
5 he was not going to re-offend when he is 33 years old, caught
6 in May of 2013, with ten bags of marijuana in the left pocket
7 of his cargo pants at 1:30 in the afternoon. I don't think
8 that it has anything to do in terms of -- it shows a likelihood
9 that he wouldn't re-offend or that it would be unfair to count
10 a conviction in June, late June of 2013, when he was 34 years
11 old. Although he was convicted for possession of marijuana, in
12 paragraph 115, it indicates that, at 1:40 a.m., in the morning,
13 he was stopped while operating a vehicle with excessive window
14 tints. So he was very fortunate that he was simply arrested
15 for possession of marijuana, because according to the facts of
16 that, it seems that he was perhaps driving under the influence
17 of an intoxicant or an inebriant in any situation. Again, he
18 is 33 and 34 at the time those took place. Those, to me, are
19 not the convictions I was thinking about that might be
20 substantially overstating the seriousness of his criminal
21 record. I was more concerned with his earliest conviction, and
22 while that is certainly a serious offense, in which he was
23 found in possession of 10 pounds of marijuana, that took place
24 when he was 18 years old, following not too far after a
25 youthful offender adjudication that he had for also selling

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1 drugs, selling crack cocaine, but there is a difference there
2 in terms of the crimes committed. It was more perhaps
3 unfortunately understandable that at the age of 17 he didn't
4 learn his lesson when the court was very lenient with him and
5 gave him youthful offender treatment in terms of the
6 convictions. The other convictions, when he is in his thirties
7 and he is selling marijuana and driving around under the
8 influence of marijuana, those seem like more serious concerns
9 to me.

10 Is there anything you want to add to what you have
11 said?

12 MR. GREENFIELD: No, your Honor.

13 THE COURT: Let me hear from counsel for the
14 government.

15 MR. CAPONE: Your Honor, I don't agree that the
16 conviction at the age of 18 is one that should lead the Court
17 to depart. I understand he was 18 years old, but it is the
18 most serious of his offenses short of this one. It's 10 pounds
19 of marijuana. That is not a street-level sale. That is
20 trafficking in a significant quantity of drugs, more so than
21 some of these other convictions. And this is also an offense
22 that he then violated probation for. That's why he has more
23 points, actually. It looks like he didn't get a significant
24 jail sentence for it. It would have only been one point in
25 spite of the fact it was -- sorry, that's the first one that he

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1 violated his probation on. In any event, it is a significant
2 quantity of marijuana.

3 In terms of the likelihood of re-offense, there is a
4 long history of criminal activity from the age of 17 to the
5 present, to the year 2013, that I think should give the Court
6 significant concern. There is a conviction in '96. There is a
7 serious conviction in '97. There is a conviction in 2001.
8 There is a gap until 2013 that Mr. Greenfield refers to, but
9 from 2001 until 2010, he was either in inpatient treatment or
10 in jail for a good part of that. That explains why he is not
11 continuing to commit crimes. From 2010 to 2012, when
12 Mr. Greenfield stresses his employment and doing good things
13 during that time period, the current offenses are smack in the
14 middle of that time period. And again, more crimes in 2013.
15 He has two parole violations, including for the current
16 offense, he was committing this crime while on parole. While
17 concededly these are not violent crimes except for the
18 marijuana actually, these are not huge quantities of narcotics,
19 there is a long pattern of criminal activity and of not being
20 deterred despite being sentenced, spending time in jail, not
21 being deterred while on parole.

22 While I don't dispute that your Honor can take all of
23 this into account in terms of 3553(a), I don't think we are in
24 a departure circumstance here.

25 THE COURT: Okay. Thank you.

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1 Let me find out if the parties have any information
2 regarding the bench warrant that was issued back on
3 September 15, 1998, when he was on probation for that criminal
4 possession of marijuana in the first in Queens for the
5 10 pounds of marijuana. I notice that it doesn't appear that
6 he was arrested on a warrant because he picked up another case
7 so to speak. It may be, based on what is in the presentence
8 report and the information about his addiction that perhaps
9 there was a bench warrant issued because he tested positive for
10 drugs, but I don't know if the parties have any information
11 about that.

12 MR. CAPONE: I don't, your Honor. You may be right
13 because he, obviously, had already pleaded and been sentenced
14 at that point. So it is unlikely a failure-to-appear type of
15 bench warrant.

16 MR. GREENFIELD: He tested positive for the drug test
17 when he went to see the probation people, and then he didn't go
18 back to court.

19 THE COURT: It does seem to me -- and I want to hear
20 if the government has anything to add again -- that earliest
21 conviction -- and even though I understand it follows a
22 youthful offender adjudication -- it seems from the presentence
23 report that when he was arrested on December 4, 1996, at the
24 age of 17, and got that youthful offender adjudication, that he
25 was sentenced on March 24, 1997 to a year. My belief is

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1 certainly at that time -- I think it is still the case -- in
2 New York State if you're sentenced to a year in custody, you do
3 what is known as the city time and do two-thirds of that time
4 in jail, which means he would have done eight months in
5 custody, would have been released sometime in August of 1997,
6 and then perhaps -- and obviously, if he did that, did that
7 eight months in custody, was not going to be receiving any sort
8 of drug treatment at that time or getting any sort of help with
9 the addiction, and then shortly after that, he has this other
10 again serious offense but it seems as if he is doing so
11 definitely in the midst of his addiction to marijuana at that
12 time.

13 Now, again, I'm more concerned with the offenses that
14 took place after that because it does seem that at that point
15 after that conviction he is certainly given probation and I'm
16 assuming given the opportunity for drug treatment, and it seems
17 from this perhaps relapse -- again, I don't have all those
18 facts in front of me -- certainly would have been given the
19 opportunity for drug treatment, it didn't work. Sometimes that
20 happens. It usually doesn't work necessarily the first time.
21 I'm not trying to minimize the significance of the 10 pounds of
22 marijuana, but it does seem to me at that time, at the age of
23 17, doing eight months in jail, getting out without having any
24 treatment and then still dealing with this addiction, and based
25 on the trauma that he experienced as a child, it is certainly

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1 not something that the Court would condone, but the Court
2 understands and it does seem that that is something that
3 substantially overstates the seriousness of his criminal
4 record, those three points for that.

5 Again, the subsequent convictions I don't have those
6 same concerns because then he had an opportunity to receive
7 some drug treatment and had an opportunity to have been
8 convicted of a felony instead of just a youthful offender
9 adjudication and didn't seemingly learn his lesson when he was
10 22 years old. I'm certainly not convinced that these other
11 convictions when he was in his thirties represent an indication
12 that there was not a likelihood of re-offending. So I am
13 inclined to horizontally depart under 4A1.3 for those three
14 points for the crime listed in paragraph 104, which would take
15 him from 11 criminal history points to 8 criminal history
16 points, which would take him to criminal history category IV,
17 but let me hear from the government if there is anything else
18 you want to say.

19 MR. CAPONE: Well, your Honor, I understand your
20 ruling. I don't necessarily agree that whether he was addicted
21 to drugs at the time or at the time of any of the offenses, I
22 don't know that that goes to the seriousness of his record. It
23 is part of the picture of who he is, but I don't know that it
24 undermines the seriousness of the record. So I will just note
25 my objection for that purpose.

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1 THE COURT: Anything else from the defense on this?

2 MR. GREENFIELD: No, your Honor.

3 THE COURT: I will horizontally depart one criminal
4 history category to criminal history category IV, for a total
5 criminal history point value of 8.

6 Let me hear from the parties regarding any other
7 issues they wish to raise, starting with defense counsel.

8 MR. GREENFIELD: I will try to keep it as brief as
9 possible. Yes, your Honor.

10 Without going over his criminal record again and his
11 work history during that period of time, I'm going to just now
12 address his role quickly in the offense and also go into what I
13 believe are significant 3553(a) factors that should be
14 considered for variance purposes.

15 Quickly, I don't even know the number of burglaries
16 that were involved in this, but I know it was a great number.
17 My client was involved in six of them. He was not a planner,
18 organizer, manager. He didn't set any of them up. He didn't
19 dispose of the pharmaceuticals that were taken. In fact, he
20 used them whenever he got his hands on them. Basically, he is
21 that, somebody who got involved in criminal conduct, but
22 certainly not a master mind of this ring.

23 To a degree, obviously, people are sentenced because
24 of the crimes they commit and to a degree they should be
25 punished for that. Actually, I was watching TV two days ago

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1 and I heard the president discuss before the national
2 convention of the NAACP what he believed were some of the
3 problems with the criminal justice system, and he talked about
4 over sentencing. He talked about the lack of vocational
5 training. He talked about the lack of drug rehabilitation, and
6 he talked about education. But more surprisingly yesterday,
7 when I was preparing for this at home, I had the TV on, and up
8 popped former President Clinton, and he talked about what he
9 believed was the failure of the Criminal Activity Act of 1994.
10 He considered it an absolute failure, his words. He thought
11 that the excessive sentencings were wrong, his word.

12 Now, why did he do that? And he explained it. He
13 said the reason I say it is wrong, the reason I say the whole
14 criminal justice system needs retooling -- my word, not his --
15 is we, in 1994, meaning the Democrats, were in a situation
16 where we politically were getting our butts kicked year and
17 year after because we were quote/unquote soft on crime. That
18 is why that act was enabled in Congress. Those were his words
19 again. He said we were wrong, we shouldn't have done it, and
20 we have to do something about it, and we have to do it now. He
21 was talking about sentencing and the excessive sentences that
22 are -- I wouldn't say mandated -- they are obviously not
23 mandated anymore -- but that are being given out and have been
24 given out in the past.

25 Let's talk about my client now. You read in the

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1 probation report about, growing up as a little child, he was
2 the victim of repeated sexual abuse by neighbors. His father
3 was at work around the country. His mother was at work. She
4 left him with the neighbors for care, and he was abused. He
5 brought it ultimately -- I don't know when and where, and it is
6 hard to talk with him about that because it is a hard subject
7 to talk about -- but he obviously at one point told his father
8 what happened. And rather than react favorably, his father
9 didn't believe him and beat him. So that is a kid who is
10 between four and eight years old, that's happening to him.
11 It's got to affect him somehow. Does it make him a criminal
12 back then? No, obviously, that is not what happens. But God
13 only knows at this point where his head was at because he was
14 rejected by his family, if he was telling the truth, rejected
15 by his family when he was being abused. That is a hard thing
16 for a child under eight, seven, six, five, or four to
17 comprehend.

18 At the age of 11, he was involved in a bike accident.
19 He was hospitalized for a long period of time. He became
20 medicated, overmedicated, and he became a drug abuser at that
21 point. Between the beginning of his use of marijuana and the
22 medications, he became a drug abuser.

23 He went to Daytop Village for two years, as the Court
24 is aware, but he was diagnosed there as depressed but never
25 received any rehabilitation or counseling or therapy. They

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1 diagnosed him as a depressed individual.

2 He has never had any therapy. He would certainly
3 welcome it if given an opportunity while incarcerated, and that
4 is what I think the president and former president were talking
5 about. Not just throw him in, but help him when he's in, give
6 him vocational training, just don't warehouse him.

7 There's a judge -- it might have been in this court --
8 that I tried six cases in front of when the guidelines first
9 came into effect. He said, it's a waste of time, they're going
10 to change them eventually, probably in ten years. He was off
11 by a couple of years. But he said, all that is going to happen
12 is people are going to be warehoused in jail and continued to
13 be warehoused in jail. I don't think he will mind me telling
14 you, it was Judge Duffy. I have had six trials in front of
15 him. We know each other well. The day that they were
16 implemented, he was against what guideline sentencing stands
17 for. You sentence the individual, you don't sentence by the
18 number.

19 Obviously, I know the Court is not going to sentence
20 by the number, but what I'm going to ask the Court for is a
21 variance in the sentence to allow him to get below that
22 70 month threshold. He knows he has done wrong. But even
23 while he was doing those wrongs, he was still being the
24 caretaker to his parents that he was. He was still
25 legitimately earning money. He was trying to be employed. The

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1 labor market fell apart I guess for felons and manual laborers.
2 It did for many people. There are lawyers who still haven't
3 gotten a job who were out in the job market in 2009.

4 Obviously, what I'm saying is I think he needs a
5 break. I know he needs a break. The question is what should
6 it be.

7 And I know there is a need for deterrence, I know
8 there is a need for public protection and punishment, but the
9 individual is as important as the sentence itself.

10 You have read letters from loved ones. You have read
11 his letter to your Honor. I think he deserves one last chance
12 to live a decent life. We're not asking to let him go home
13 tomorrow. We understand he's going to be incarcerated for some
14 time, but what we're asking for is a prison sentence, if the
15 Court would allow, of less than 70 months.

16 At the time his mother passed away, it was in
17 December, right before Christmas, he was beside himself,
18 couldn't understand what happened. She was, to his mind,
19 wasn't that ill, and he couldn't understand what happened while
20 he was in jail. He wanted to visit with his mother one last
21 time. It was right before Christmas. And from the day he got
22 back from the prison until maybe three months later -- it is
23 hard to talk to him, he is inconsolable, but one thing he
24 brought to my attention every single time, he said, "Did you
25 talk to the marshals that brought me there, did you let them

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1 know how grateful I was?" That's not a bad guy. He still
2 talks about how the Marshal Service took him out, brought him
3 to a funeral home, maybe at night, early morning hours before
4 it opened, and did him that favor a day or two before
5 Christmas. He learned what decency is. He knows what decency
6 is.

7 If the Court can find it, I would ask the Court to
8 impose a sentence of less than 70 months.

9 Thank you very much.

10 THE COURT: Okay. Let me hear from the government.

11 MR. CAPONE: Thank you, your Honor.

12 I don't have very much to add beyond what is in USA
13 Masimore's submission. This was a really serious crime. I
14 don't need to spend much time on that. The Court has had this
15 case for quite some time now. The defendant was involved in
16 six of the burglaries. He was an active participant in them.
17 He wasn't a lookout. He was someone who went in and
18 burglarized pharmacies time and again in 2011, using apparently
19 the knowledge of welding he learned. The PSR said he learned
20 welding skills, along with some of the other co-defendants in
21 this case, and it was a relatively sophisticated operation.
22 Sure, he is not a mastermind, but he is not getting mastermind
23 points, and he is not getting points for being a minor player.
24 He was a burglar for that time in 2011.

25 We have just had a lengthy colloquy of his criminal

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1 history. It is significant. The Court has given him some
2 credit in terms of it being overstated, and I understand that.
3 But in light of that and in light of the many convictions that
4 he has had, some to jail terms that are not terribly less than
5 the guidelines range that he is now facing but that have not
6 deterred him, and when you also consider the parole violations,
7 there is a real need for deterrence here. And so considering
8 that and the gravity of the offense and the role of the
9 defendant, I think a sentence in the guidelines range, which is
10 at the low end, just under six years, is appropriate for this
11 defendant and his role in the offense.

12 THE COURT: Okay. Defense counsel, I notice there are
13 some people in the audience. Are those people here for
14 Mr. Avalo? Can you give me a sense of who those people are?

15 MR. GREENFIELD: Yes, your Honor. His father,
16 brother, niece, and fiancée.

17 THE COURT: Okay. I have read the letters, and I have
18 read Mr. Avalo's letter, as well. I will give Mr. Avalo a
19 chance to address me if he would like. Before we do that, if
20 defense counsel would like, if you wish to call one of those
21 family members as a witness, I will let you do that, if you
22 want to call one of them.

23 MR. GREENFIELD: May I have a moment, your Honor?

24 THE COURT: Yes.

25 (Pause)

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1 MR. GREENFIELD: Your Honor, if I might, his niece
2 wrote the Court a letter. She just didn't anticipate anything
3 like this, nor did I. She is not a public speaker, has never
4 been in a circumstance like this. If we could, I would ask the
5 Court to just make any inquiry or make it as easy for her to
6 talk as possible. I couldn't, obviously, prepare her.

7 THE COURT: No, I don't believe it would be any sort
8 of grueling examination. She would simply take the witness
9 stand, if she wishes. She doesn't have to. No one has to. If
10 she wishes, she can take the witness stand. She will be sworn
11 as a witness. She can say whatever she wants to say. If you
12 have the questions, the government has questions, if she wishes
13 to. I don't want to make anyone uncomfortable. I have read
14 the letter. I have read all the letters. If she wants to, she
15 can, but she is certainly not required to.

16 MR. GREENFIELD: She wishes to.

17 THE COURT: Let's have her take the witness stand and
18 have her sworn.

19 GERLYN AVALO,

20 called as a witness by the Defendant,

21 having been duly sworn, testified as follows:

22 THE DEPUTY CLERK: Please state your first and last
23 name and spell it for the record.

24 THE WITNESS: Gerlyn Avalo. G-E-R-L-Y-N A-V-A-L-O.

25 MR. GREENFIELD: With the Court's approval, can I

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1 stand here?

2 THE COURT: That's fine.

3 Just please speak into the microphone. Go ahead, just
4 tell me anything you would like to say.

5 THE WITNESS: I mean, Martin is all I have known as a
6 father figure. He is not a bad person.

7 THE COURT: That's fine. Just take your time.

8 THE WITNESS: I understand, you know, we all make
9 mistakes, but like we need him home. My grandmother died. My
10 grandfather -- I can't do it by myself. He was everything to
11 the family. He was the person who cared and provided for us.
12 He was the person that, whenever we needed something, was
13 there. He is all my grandfather really has.

14 I mean, you don't have to send him home tomorrow, but
15 I mean we don't know what can happen. Like it is just me and
16 my grandfather. My uncle is sick. My dad is never around. It
17 is just not the same. And I'm not trying to blame him, but
18 because of the fact that he wasn't home, my grandmother went
19 through a lot of depression. She went through a lot of pain.
20 She was very lonely. That was her baby. That was the son that
21 she spoke to, the son that took her to all of her appointments.
22 That was the son that helped her pay the rent. That was the
23 son that gave her for her nails and for her hair. I know it
24 might not be important for people, but it means something, and
25 it is important. It is something like you want.

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1 Like, we're not perfect. We all make mistakes. You
2 live and learn. And he has learned.

3 Having to see your mom in a deathbed. You don't think
4 that is quite a punishment? Whoever wished that on somebody?
5 Having to sleep knowing that you didn't hug your mother,
6 knowing that you're missing that, knowing that there was so
7 much you still had to accomplish as a family and you're not
8 there to be able to do that.

9 When I first went to college, I needed money, you
10 know, because financial aid wasn't helping me out. He was the
11 only person there for me. When I graduated high school. When
12 I did all of my applications. My first job. He is all I know
13 as a father figure. And he plays a very important role in my
14 life. And he plays an important role in everyone's life in my
15 family. My grandfather misses him. I miss him. My uncle.

16 I mean, I don't know what else to say to help people
17 understand that that is all we have. It is not the easiest
18 thing to sit here and try to convince people, like, hey, this
19 guy's important. Family is family. And when somebody is there
20 for you, it is hard to live without that person. It is not the
21 same having a collect call versus having someone home. It is
22 not the same waking up, you know, questioning yourself, hey,
23 how are we going to pay this rent today or who is going to take
24 me to my doctor's appointment, because the person who used to
25 do that and used to help us out and was there for us is no

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1 longer there.

2 He's not a bad person. He has one of the most amazing
3 hearts. He is the most intelligent, loving man I know. And to
4 me, in my eyes, he will always be a hero. He is always going
5 to be my hero. He is always going to be the best man I've
6 known. No matter what happens. No matter what the people say
7 about him. He has impacted my life in the best way. He can
8 impact somebody that's 22 years old.

9 That's, honestly, all I have to say.

10 THE COURT: Okay. Thank you.

11 Are there any questions by defense counsel?

12 MR. GREENFIELD: No, I have no questions.

13 THE COURT: Any questions by the government?

14 MR. CAPONE: No, your Honor.

15 THE COURT: I have a few questions.

16 First, I want to say I am sorry for your loss, loss of
17 your grandmother, and I know this is difficult for you, and I'm
18 certainly paying very close attention to everything you're
19 saying.

20 I am curious, how has the family been able to pay the
21 rent and pay the bills and everything? Because I know
22 Mr. Avalo has been in custody for some time already now. How
23 has that been going? How are you able to do that now?

24 THE WITNESS: Well, I work two jobs, and it is very
25 difficult for me. Also, you know, my dad, he's not the best

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1 person to rely on, but, you know, now that my grandmother is
2 gone, you need to understand it's either we pay the rent or we
3 get it together or, you know, we're in the streets. So I'm
4 doing the best I can, but I mean I also have schools and
5 internships. And my dad doesn't live with us. So majority of
6 the time I will stay with my grandfather, you know. To me, the
7 most important thing is rent. And then, you know, things like
8 internet or cable is just something, a privilege. If you don't
9 have it, you don't have it. You know what I mean?

10 THE COURT: Have you visited Mr. Avalo while he's been
11 in custody?

12 THE WITNESS: Yes.

13 THE COURT: Have you talked to him about how his
14 absence has been affecting the family?

15 THE WITNESS: Yes, he knows that. When he calls home,
16 when I visit, you know, when I visit him. I don't have much
17 time because I'm working, and, you know, I can't miss a day of
18 pay to see him. It's hard. But, I mean, this is the world we
19 live in.

20 THE COURT: Are you able to talk to him on the phone,
21 as well?

22 THE WITNESS: When he calls the house, but he doesn't
23 really have much time to talk.

24 THE COURT: When you have talked to him about how his
25 absence has affected the family, how have those conversations

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1 gone? I don't need the specific details. How has he reacted?

2 THE WITNESS: He understands, and he sees, you know,
3 the effect that he has caused. And you know, I try not to make
4 him feel bad, but I mean, I also tell him, hey, maybe if your
5 actions would have been different, probably my grandmother
6 would have still been here. You understand? Because it is not
7 something easy when you have a mother crying every day, feeling
8 depressed, having to drink 20 pills at night, you know, sick,
9 you can't walk. It's a lot. And then he left us basically
10 alone. We don't have anybody to count on. He was all we had.
11 He was the support system. He was the person that did
12 everything for us.

13 THE COURT: Tell me a little bit about that, when you
14 say he did everything for you.

15 THE WITNESS: Everything in the sense of, you know, if
16 my grandfather needed to go to an appointment, he was there.
17 If my grandmother needed her medicines, because sometimes her
18 Medicaid didn't cover for them, he was there. When I had to
19 apply to college, when I went from a community to a four-year,
20 then I had to pay for application fees and I had to pay for
21 books. He was there for us. It's a lot.

22 When our cell phones -- when, you know, when I only
23 had one job and I was part-time and part-time they only give
24 you 20 hours, and I didn't have money, you know, to eat for
25 lunch, he was there. When we needed food in the house, he had

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1 it, you know. Rent. Light. Everything. Clothes. Taxis for
2 appointments. He did everything. Medicines. Everything. I
3 mean, maybe it is something that people think, hey, you know,
4 well, why don't you all work, but it is just --

5 THE COURT: I'm sorry, what did you say?

6 THE WITNESS: Sometimes people would say, well, you
7 know, why don't you apply to a better job that pays you more or
8 do this, but it is not as easy to sit here and say, hey, I'm
9 just going to apply to this job or I'm just going to do this
10 when you're just adjusted to doing something and then all of a
11 sudden you have to do this 180 and change the way you're
12 living, change the time you actually spent. You can count the
13 times and the days that I spent with my grandfather because I
14 don't have the time. It is because I have to work so hard now
15 to help him pay bills and to help him, you know, keep the
16 apartment. The rent went up. The rent used to be 980. It
17 went up to almost 1,300 bucks. I mean, and it is just little
18 things like that. And we need to -- if we're not there helping
19 each other out, what's going to happen to us?

20 THE COURT: Okay. Thank you.

21 Any other questions by the government or the defense?

22 MR. CAPONE: No, your Honor.

23 MR. GREENFIELD: No, your Honor.

24 THE COURT: Okay. Thank you very much. You may have
25 a seat.

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(Witness excused)

THE COURT: Mr. Avalo, I will give you an opportunity to address me if you would like. You can say anything that you want. You don't have to say anything. I have read your letter. If there is anything you would like to say, now is your opportunity.

THE DEFENDANT: Yes, your Honor.

First I would like to apologize to the victims of the stores that I burglarized. I can imagine what it feels like for them to come to their place of business and find it broken into.

Now I would like to apologize to my family. For the last 15 years, I have been living in madness. I disgraced my family's last name.

I would like to apologize to my niece. She's made me so proud, but I haven't been there for her like I should have been. I know it must have been hard for her to lose somebody she looked up to, cared for, and to not have been there for her when she most needed me to be there for her, when she lost her grandmother, my mother.

To my brothers, I'm truly sorry to you. I wasn't there for you in your darkest hours when your demons were knocking on your door. For that, I am truly sorry for you, Rob.

To my girlfriend, she's been my angel on my shoulders.

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1 Comes to visit me in prison. Been everything that I have
2 needed in a woman. You have been the hard rock in my corner.
3 For you, I'm grateful, but I am also sorry because I pushed my
4 relationship to my back because of my imprisonments.

5 To my dad, to my father, I'm truly sorry because I
6 know you in your heart believe that you failed me, but you
7 didn't fail me. I failed you. I failed him. If I would have
8 just listened to him and done things a little different and
9 took his advice, I wouldn't find myself in these circumstances
10 today that I find myself in.

11 For my mom, I have to live with the regret of knowing
12 that if I was home she probably wouldn't have died, she
13 probably wouldn't have been suffering or depressed. If I had
14 been there to give her CPR or something, done something, but I
15 wasn't. I got to live with that.

16 All I ask is that -- I know I made plenty of mistakes
17 in my life. All I ask is the chance. Words can't describe my
18 actions because actions speak louder than words. Also, I give
19 you reasonable doubt to believe in me. So I can show you the
20 chances, so I can show you my actions better than I can say.
21 All I can ask is to be put at the mercy of this Court, put my
22 trust in God, and ask for forgiveness.

23 Thank you.

24 THE COURT: Okay. Thank you.

25 Also, Mr. Avalo, on behalf of the Court, I wish to

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1 extend my condolences, as well, to you on the loss of your
2 mother, which I know has been very difficult in any event.
3 Certainly, while you've been incarcerated, I know that is very
4 difficult for you.

5 I have a couple of questions for you, Mr. Avalo.

6 I have read all of the letters. I have listened very
7 closely to everything you have said, everything your lawyer has
8 said, everything counsel for the government has said, and
9 everything that your niece very eloquently stated here in
10 Court.

11 I truly believe that while you were out, you were in
12 fact providing great support for your family, both emotionally,
13 as well as financially.

14 One of the things that concerns me greatly is the need
15 for deterrence in this case. This is, obviously, not the first
16 time that you've been arrested. Your niece spoke very
17 eloquently about all of the help that you provided the family.
18 And while the emotional support, taking your family members to
19 doctors' appointments, helping people fill out applications is
20 very laudable, I am a little bit troubled by the financial
21 support. That is certainly something that you should do, but
22 I'm worried, because according to the presentence report, you
23 really haven't been employed for a while, at least not legally.
24 I am concerned that whenever you are released, those pressures
25 to help provide support for your family and any other pressures

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1 you might have might lead you back down the road to selling
2 drugs or engaging in some other sort of illegal activity, to
3 not only, perhaps, feed a drug habit but also provide that kind
4 of financial support.

5 One of the things that I'm wondering about is if
6 you've given any thought to what it is you're going to do when
7 you get out. Your lawyer spoke earlier about statements made
8 by various presidents, this president and a former president,
9 about drug rehabilitation programs, vocational training and the
10 like. You've, obviously, had opportunities at drug
11 rehabilitation programs. You, obviously, have a set of skills
12 already as a welder.

13 I'm just wondering if you can tell me what is your
14 plan for when you get out, because if it is going to be again
15 I'm just going to get out and get money however I can to help
16 support my family, you're going to be in the same situation, if
17 not a worse one. I know you have had time to think since
18 you've been in custody, and I know it must have been difficult
19 because of all of the stress from the loss of your mother, but
20 tell me what your plan is, if there is a plan for when you get
21 out.

22 THE DEFENDANT: My plans are simple. My plan is to go
23 back to school and finish IT Tech, get back out into the
24 welding community, because these school systems provide you
25 with the necessary skills, and they put you in the work force

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1 environment to help you build yourself, to help you move on in
2 life.

3 I know one thing for sure. I can't go back to what I
4 was doing, no matter what. This is insanity for me to keep
5 seeking, keep doing the same things and expect different
6 results. I have to give myself a chance. I'm almost 40. I
7 would like to some day have my own family. I just don't want
8 it to be from prison. I don't want to see myself in these
9 walls ever again. I don't want to lose my dad while I'm in
10 prison. I know that I have to work hard myself, and I have,
11 and I'm continuing to work hard. And every day that goes by, I
12 keep this motto in my mind, that how would my mom look upon me.

13 I know I have a lot of expectancies out of family
14 members, but I expect more out of myself than they expect from
15 me, whether it be financially or emotionally or physically.

16 There's plenty of things that I'm good at, but I think
17 my craft is welding, my craft is construction. That has always
18 been my craft. I'm pretty good with my hands. I plan to work
19 on that every day more and more when I'm given an opportunity.

20 THE COURT: Thank you.

21 How long is the program that you would need to
22 complete at ITT Tech?

23 THE DEFENDANT: It will be 18 to 24 months. And
24 during all that time, you know -- I have been dealing with
25 addiction a lot. How I have been dealing with it, one day at a

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1 time. That's the motto of NA. That's what I have been
2 attending every week. One day at a time. One day at a time.
3 One minute at a time. One moment at a time. I can't go any
4 further than that. And I will not be dealing with addiction
5 anymore.

6 I know what I have to for myself. I know what I have
7 to do for my family. I'm going to do it regardless. I'm going
8 to make it. Because I can't fail no more. Failure is not an
9 option for me. If I fail, I'd just rather be dead, I'm giving
10 up on life.

11 THE COURT: Okay. Thank you.

12 Again, my concerns are multifold here. There is the
13 concern, obviously, about your drug addiction, and I certainly
14 understand what you're saying in terms of taking that one day
15 at a time, but you have a criminal record. This is another
16 conviction on your record. Your family needs you to help
17 support them. They're probably going to still certainly need
18 financial support from you. And in terms of the plan, in terms
19 of your employment, that has to be more than just one day at a
20 time, because if you're just going on hope and saying I hope I
21 won't do the wrong thing, and when you get that request from
22 your family members saying that they're struggling and they
23 need help for the rent, while you're in school, I would like to
24 know if you have thought about it, and maybe we can put this
25 off and give you some more chance to think about this, but

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1 there needs to be some sort of plan for either how your family
2 is going to be able to support themselves or how you're going
3 to help support them in addition to yourself while you're in
4 school, because if you're just talking about going to school
5 and not getting a salary and your family needs that financial
6 support, I'm extremely concerned as to what might happen.

7 So if you know, now tell me what is your plan for how
8 you're going to support your family and support yourself while
9 you're in school.

10 THE DEFENDANT: Well, one of the resources I used last
11 time, how I got myself in construction work before was I worked
12 as a messenger, as a foot messenger. The reason I did that, it
13 was a job. It paid me. How I did it was I did it to the best
14 of my ability. Everywhere I went, I went into different
15 buildings, different places that a normal person can't go
16 because I was delivering packages, and I would have to use my
17 resources, I looked further on to better myself to get a better
18 job everywhere I went. I'm willing to take the chances to go
19 back to messenger services. I'm willing to work whatever needs
20 to be done, whether it be working at McDonald's again, which I
21 have done before, or going back to a messenger service, which I
22 know that's where I plan to go to, the messenger services
23 because they always need messengers, they always need somebody
24 to take a package here and there or bike here and there. And I
25 know the city pretty well, and I'm willing to do whatever I

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1 have to do lawfully to be within the laws, be a law-abiding
2 citizen.

3 (Continued on next page)

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1 THE COURT: Thank you.

2 Anything else from the defense? Anything else from
3 defense counsel?

4 MR. GREENFIELD: No, your Honor.

5 THE COURT: Anything else from the government?

6 MR. CAPONE: No, your Honor.

7 THE COURT: Let me ask defense counsel, and if
8 Mr. Avala wants to answer this, that's fine as well. Let me
9 just address this to Mr. Avala, if you feel you can answer it.
10 Again, you've been to jail several times before. Can you tell
11 me what is it that you feel that you've learned from each time
12 that you went to jail? I guess, first of all, do you feel that
13 you have learned anything from the other times you went to
14 jail? Let's start off with the time in 2001. Do you feel that
15 you have learned anything during that period of time? You
16 spent 54 months in jail. And if so, what, what did you learn
17 from that?

18 THE DEFENDANT: In 2001, what I learned was that
19 associating myself to the wrong individuals can only bring bad
20 determinations, bad decision making. I mean, a long time ago I
21 wrote something and it went along the nature of if you roam
22 with wolves you learn how to holler, but if you associate with
23 eagles you learn to soar to great skies. That's what I always
24 wanted, to associate myself with different individuals, to
25 become a better person. When I was working for IBS Building

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1 Services, I was associating myself with different individuals
2 and thus staying on track. I lost my job, I stopped working 60
3 hours a week and went back to the neighborhood to hang out in
4 front of the same places that I caught my first prior cases to,
5 just hanging around negative individuals. That's what I
6 learned from my first bid, and it just didn't make no sense.

7 This time around, you know, it's said that a man, when
8 a man go through a harsh time in his life, when he loses
9 somebody great to him, it causes a change in him. I lost the
10 greatest person in my life, my best friend. I know, I know I
11 have to change. I've been working every day implementing those
12 changes, but my changes can't really take effect between these
13 walls. They have to be shown. I can't tell you what my
14 changes will be, I can only show you. And I'm just asking you
15 to give me the chance so I could show you, better than I could
16 tell you. I've hurt my family continuously.

17 THE COURT: Defense counsel, do you anything to add?

18 MR. GREENFIELD: No, your Honor.

19 THE COURT: Counsel for the government.

20 MR. CAPONE: No, your Honor.

21 THE COURT: I've reviewed all of the letters, and
22 again, I've listened very closely to everything Mr. Avala has
23 said. I've listened closely to his counsel and his niece.
24 This is a very difficult decision. What I am still very
25 concerned about, Mr. Avala, I'm not tremendously worried about

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1 your intentions at this time, but I am still very concerned
2 about what seems to me the lack of a fully articulated plan.
3 And what I'm really concerned about is, oftentimes, when people
4 are in prison and when people go away to prison, they get
5 forgotten, and despite the best wishes and intentions of family
6 members, life gets in the way, and if there's not a plan for
7 people to continue communicating with that family member in
8 prison, they sort of just kind of get forgotten; the phone
9 calls go from being once a week to once a month, to getting
10 shorter, and there are more and more gaps in between, and I do
11 think that the family support is critical in helping to keep
12 you motivated.

13 I'd like to maybe hear more of a plan from you and
14 perhaps your family members as to how they're going to support
15 you while you're in custody. But more important, I'd like to
16 get a clearer sense of a fully articulated plan. I understand
17 when you say you have to show me and can't tell me. I
18 understand that and I agree with that. But if you can't tell
19 me, if you haven't thought of the plan, it's kind of hard to
20 show the plan, and when life starts getting in the way, that's
21 when things fall apart. It seems to me, from what you've said,
22 and it seems to me from the information that I have before me
23 that when things were at their best, you seemed to do OK. When
24 you had this job and things were OK, you did all right, and
25 what you're talking about now is even things best case

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1 scenario.

2 What I'm concerned about is what happens if you can't
3 get a messenger job when you get out. What is the backup plan?
4 What happens if you get a messenger job and then get fired from
5 that job? It can't simply be there's no other plan, I'm
6 despondent now, I'm going to go back to what I did before.
7 What happens? And again, I'm not sure how realistic it is.
8 You say you fell back into going to that old neighborhood and
9 hanging around those old places, and I understand sometimes
10 there's a tendency for people to want to believe that they can
11 simply avoid the old neighborhood. Maybe you can, but
12 sometimes that's not really realistic because people have
13 family members and friends there, so there needs to be some
14 sort of plan as to how you can survive in that neighborhood
15 without associating with those same kind of folks and without
16 resorting to the activities you resorted to when things get
17 tough. That's what I'm concerned about, and I'm concerned that
18 there seems to be right now a lack of that plan.

19 Here's what I propose to do, here's what I'd like to
20 do. I'm going to continue to think about this and I think we
21 should adjourn this for some time and that will give you a
22 chance, Mr. Avala, to sit down and think about this. The crime
23 here is serious. I feel that it's appropriate for me to
24 sentence you to some time, but I'd like to have some sense of
25 what your plan will be while you're in prison and what your

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1 plan will be when you get out of prison, because I don't
2 question your intentions, and I understand what you are saying
3 and the sincerity with which you are saying these things to me.
4 And I know that you mean the things that you are saying to me,
5 and your niece certainly means the things that she's saying to
6 me. But just honestly, you're saying these things, and again,
7 I'm not saying you don't believe them, you're saying these
8 things to me because you know that I have the power to decide
9 what your sentence is going to be. Once I make that
10 determination, I in many ways cease to be that important in
11 your life. But your family is going to be important in your
12 life throughout this, and I'm worried about how they're going
13 to support you, you're going to support them, and what you're
14 going to do when you get released.

15 Obviously, you're on supervised release and if you
16 violate supervised release, you could end up back before me and
17 I could sentence you to additional periods of custody. But on
18 one hand, there are some expectations there that may not be
19 particularly relevant. It's a pretty low threshold in terms of
20 those expectations, just hoping that you don't get arrested
21 again or don't violate the terms of supervised release, which
22 sometimes can be onerous. But I really am concerned as to what
23 your plan is going to be and what your family's plan is going
24 to be, so I'm going to adjourn this for some time for you to
25 think about this, because I'm sure, as you indicated, back when

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1 you did a significant amount of time in 2001 and 2002, I'm sure
2 you thought about what you did and you had the intentions of
3 trying to do things the right way. But then when things go
4 wrong in life, as they frequently do, without a backup plan,
5 without a safety net, we tend to start resorting to those same
6 old habits. I'm going to give you an opportunity to think
7 about that while I continue to think about the appropriate
8 sentence in this case.

9 Can we get a date, Tara, perhaps sometime in
10 September?

11 THE DEPUTY CLERK: Friday, September is the 18th, at
12 3:30.

13 THE COURT: Does that date and time work for everyone?

14 MR. GREENFIELD: Yes, Judge.

15 MR. CAPONE: Yes, your Honor.

16 THE COURT: All right. Again, I want to thank the
17 family members for being here today. I want to thank you for
18 your letters. I want to thank Mr. Avala's niece for her
19 testimony here. I've got a lot to think about. And,
20 Mr. Avala, you've got a lot to think about as well. I'll see
21 you later. Bye.

22 (Adjourned)
23
24
25